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Atty. Dkt. No. 040302-0383

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Keisuke WAKABAYASHI

Title: FUEL CELL SYSTEM

Appl. No.: 10/780,767

Filing Date: 2/19/2004

Patent No.: 7,442,454

Grant Date: 10/28/2008

Examiner: John S. Maples

Art Unit: 1795

Confirmation Number: 2070

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. §1.705

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant respectfully requests reconsideration of the Patent Term Adjustment (PTA) determined for the captioned patent, which issued on 10/28/2008 as U.S. Patent No. 7,442,454.

The Patent Office determined that the patent was entitled to 458 days of PTA. Applicant believes that this PTA determination was made in accordance with the "Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. §154(b)(2)(A)" published at 69 Fed. Reg. 34238 (Jun. 21, 2004). Under that interpretation of the PTA statute, any PTO delay under 35 U.S.C. § 154(b)(1)(A) is deemed to overlap with any 3-year maximum pendency delay under 35 U.S.C. § 154(b)(1)(B), and so, as a practical effect, PTA may be awarded under §154(b)(1)(A) or §154(b)(1)(B), but not both.

On September 30, 2008, the United States District Court for the District of Columbia issued a decision finding that the U.S. Patent and Trademark Office's interpretation of the PTA statute is incorrect. *Wyeth v. Dudas*, Civ. Action No. 07-1492 (JR) (Sep. 30, 2008). The court determined that, under the correct interpretation of the PTA statute, periods of "overlap" are limited to "periods of time . . . [that] occur on the same day." *Wyeth*, slip op. at 8. Thus, a PTO

delay under §154(b)(1)(A) overlaps with a delay under §154(b)(1)(B) only if the delays "occur on the same day." *Id.*

Applicant has recalculated PTA for the captioned patent under the court's interpretation of the PTA statute, and has determined that the patent is entitled to 710 days PTA, as shown on the attached sheet, which shows the relevant delays under 37 CFR §§1.702(a) and (b), and under 37 CFR §§1.703(a) and (b).

The attached sheet details the circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of such application as set forth in § 1.704.

(a) Total of non-overlapping PTO delay under §154(b)(1)(A) & (B): 818 days

(b) Total Applicant delay: 108 days

Final PTA Determination: 710 days

Applicant therefore respectfully requests that the patent be accorded 710 days PTA.

The patent is not subject to a terminal disclaimer.

Payment of the requisite fee is submitted herewith. Should no proper payment be enclosed herewith, as by a check being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

However, because this PTA error is due to a Patent Office error in interpreting and applying the PTA statute, a refund of the fee is respectfully requested.

Respectfully submitted,

Date NOV 17 2008

By  39,370

FOLEY & LARDNER LLP
Customer Number: 22428
Telephone: (202) 672-5490
Facsimile: (202) 672-5399

Michael D. Kaminski
Attorney for Applicant
Registration No. 32,904

Patent Term Adjustment Calculation System

Docket Number: 040302-0383
 Application Number: 10/780767
 Patent Number: 7442454

| | Event Description | Event Date | Days from Filing | PTO Days | Applicant Days |
|---|---|------------|------------------|----------|----------------|
| Edit Delete | Application Filing Date | 02/19/2004 | 0 | | |
| Edit Delete | IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO | 09/17/2004 | 211 | | |
| | 14 month From Application date | 04/19/2005 | 425 | | |
| Edit Delete | Restriction Requirement | 11/06/2006 | 991 | 566 | |
| Edit Delete | Restriction Requirement Response Received at PTO | 12/06/2006 | 1,021 | | |
| Edit Delete | Non-Final Office Action | 01/04/2007 | 1,050 | | |
| | 3 Year Period Starts | 02/19/2007 | 1,096 | | |
| Edit Delete | Non-Final Office Action Rsp. Rcv'd at PTO | 04/03/2007 | 1,139 | | |
| Edit Delete | IDS under 1.704(c)(8) filed at PTO | 06/20/2007 | 1,217 | | 78 |
| Edit Delete | Final Office Action | 06/29/2007 | 1,226 | | |
| | Final Office Action + 3 months | 06/29/2007 | 1,318 | | |
| Edit Delete | Final Office Action Response Received at PTO | 10/11/2007 | 1,320 | | |
| Edit Delete | Advisory Action | 10/11/2007 | 1,330 | | |
| Edit Delete | Request For Continued Examination | 10/29/2007 | 1,348 | | 30 |
| | 3 Year Period Stopped | 10/29/2007 | 1,348 | 252 | |
| Edit Delete | Non-Final Office Action | 01/10/2008 | 1,421 | | |
| Edit Delete | Non-Final Office Action Rsp. Rcv'd at PTO | 01/10/2008 | 1,512 | | |
| Edit Delete | Notice of Allowance | 07/23/2008 | 1,616 | | |
| Edit Delete | Issue Fee Paid | 09/17/2008 | 1,672 | | |
| Edit Delete | Patent Grant Date | 10/28/2008 | 1,713 | | |
| Totals: | | | | 818 | 108 |
| PTA: | | | | 710 | |

Created and maintained by
FOLEY
 FOLEY & LARDNER LLP

Foley & Lardner LLP